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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1966

NO. 836

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR RESPONDENT IN OPPOSITION

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January 3, 1967

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CITATIONS

Cases:

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State v. Williams (Fla. 1966), 183 S (2d) 537, Cert. denied, docket No. 160, 87 S. Ct. 42 9

Miscellaneous:

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The petition for writ of certiorari presents no new question for this Court to decide. This Court has already decided the issues in this cause in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L. ed. 2d 89 (1964). Petitioner by its wording of the question presented seeks to broaden the issues in this case so as to require this Court to issue an advisory opinion.

OPINIONS BELOW

On remand from this Court, the Chancery Court of the City of Richmond, Virginia filed an opinion on January 15, 1965 which is printed in Appendix B to the petition at pages 15 and 19. The opinion of the Supreme Court of Appeals of Virginia, reversing the Chancery Court of the City of Richmond, Virginia, filed on June 13, 1966, is printed in Appendix B to the petition at pages 19 to 35 and is reported in 207 Va. 182, 149 S.E. 2d 265.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Will this Court issue another opinion delineating in detail the nature and extent of its holding in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; 84 S. Ct. 1113, 12 L. ed. 2d 89, with particular reference to its determination of where the line between the Brotherhood's rights of freedom of speech and freedom of association and the rights of the Virginia State Bar has been drawn? Will this Court issue an advisory opinion sharply defining the rights of the parties in situations as to which no evidence has been presented?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States of America are set forth in Appendix A to the Petition, at page 1 thereof.

STATEMENT OF THE CASE

Petitioner commenced this action in June 1959 by filing its Bill of Complaint which, in paragraphs 5 and 6 thereof, alleged as follows (R. Vol. B-1, pp. 2-3):

(5) "The Brotherhood maintains what it calls a 'Legal Aid Department' which, while collecting information that is valuable to those who are interested in the welfare of railroad employees, also solicits business through the means of certain of its employees and members of its lodges for various attorneys at law throughout the United States which have been selected by the Legal Aid Department and designated by said department as Regional or Legal Counsel.

(6) "The solicitation of business for Regional or Legal Counsel has been conducted in the following manner: when a lodge member is injured or killed in the course of his employment, he or his family or estate notifies his lodge and his lodge, acting through its secretary or some other member, notifies the Legal Aid Department of the injury or death; the Legal Aid Department immediately notifies Regional or Legal Counsel of the injury or death; Regional or Legal Counsel, in turn, sends the Regional Investigator, a person who is employed and paid by both Regional or Legal Counsel and by the Brotherhood, to investigate the happening; in many cases both the lodge to which the injured man belongs or to which the deceased belonged, acting through its officers and members and the Regional Investigator, advise the injured person or his family, or the family or estate of the deceased, that the claim against the injured or deceased member's employer should not be settled without consulting Regional or Legal Counsel; and the Regional Investigator then arranges for the injured party

> or family of the deceased to execute the necessary agreements retaining the services of Regional or Legal Counsel on forms which he carries with him."

Said practices were alleged to constitute the unauthorized practice of law. The conduct alleged was substantially admitted by the Respondent but the legal conclusions were denied. (R. Vol. B-1, pp. 5-6)

At the trial, Petitioner presented transcripts of previous cases in other jurisdictions occurring as far back as 1932. Respondent's reports also were introduced both preceding and succeeding the establishment of the Legal Aid Department of Respondent in 1930. Depositions were introduced concerning 8 injuries to members of the Respondent which occurred throughout the country. None of these injuries occurred in Virginia and none of those Brotherhood members were residents of Virginia. Indeed, no evidence was introduced concerning any accidents, injuries or occurrences in the State of Virginia.

The Chancery Court of the City of Richmond entered its original decree on January 29, 1962 enjoining the Brotherhood from, among other things, (R. Vol. B-1, pp. 25-28):

> ". . . soliciting or encouraging . . . legal employment of selected lawyers; . . . and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular or group of lawyers . . ."

The Supreme Court of Appeals of Virginia denied leave to appeal and denied a rehearing (R. Vol. B-1, pp. 35-36). After certiorari granted, this Court reversed. *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 84

S. Ct. 1113, 12 L. ed. 2d 89. After rehearing was denied, this Court remanded the cause for further proceedings not inconsistent with its opinion (R. Vol. A. p. 10).

The Chancery Court of the City of Richmond issued a new injunction on January 15, 1965, at the same time issuing an opinion (Rec. Vol. A, pp. 12 through 25; Appendix B to the Petition, pp. 1 through 19.)

In that decree, the Chancery Court of the City of Richmond enjoined the Brotherhood: (R. Vol. A, pp. 24-25; Appendix B to the Petition, pp. 17-18)

> ". . . from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property, . . . from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so. . . .
>
> "But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; provided, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term 'solicit' and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state."

Petition for Leave to Appeal was granted and the Supreme Court of Appeals of Virginia reversed the 1965 injunction. The court first held that the decree could not stand in its present form under Virginia law. (Appendix B to Petition, p. 27) The court then found the conduct of the Brotherhood to be "solicitation of professional employment" as defined by a Virginia statute but squarely held that the injunction authorized by that statute must yield to the mandate of this Court. (Appendix B to the Petition, pp. 29-31)

REASONS FOR DENYING THE WRIT

1. The 1965 Decree is Invalid Under Virginia Law.

The Supreme Court of Appeals of Virginia held that the 1965 decree could not stand in its present form under Virginia law. In so holding, the court stated in Appendix B to the Petition, pp. 27-28:

> "The Chancellor interpreted Mr. Justice Black's opinion narrowly. He interpreted the opinion as requiring only that the Brotherhood be left free to recommend approved lawyers, even though its recommendations would foreseeably result in the channeling of legal employment. He saw nothing in the opinion to prevent his restraint of the Brotherhood's solicitation of legal employment.
>
> "The difficulty of drawing a line between solicitation and recommendation is evidenced by the provisions of the 1965 decree that purport to advise what is meant by 'solicitation'. The decree does not attempt to define 'solicitation'; it merely refers to source materials outside of the decree. The decree requires the defendants to understand truly the meaning and intendment of 'solicitation' as set forth in three sources: the vast body of the common law, the statutes of Virginia and the Canons of the American Bar As-

sociation adopted in Virginia. Upon pain of contempt if their understanding should be faulty, the defendants are required to forego any action constituting solicitation as so defined.

"The decree cannot stand in its present form. As said long ago by Judge Spencer Roane, a decree cannot be properly entered against persons, subjecting them to process for disobedience, 'which as yet remains general and uncertain, and the extent of which, as it relates to them, they (have) no adequate means to ascertain'. *Birchett* v. *Bolling,* 5 Munf (19 Va.) 442, 456 (1817)"

Thus it is seen that this case is not as simple as Petitioner would have it (Petition, p. 18) in its contention that the 1965 decree says plainly that the Brotherhood may recommend selected lawyers but may not solicit business for them. The highest Virginia court has said such decree is not an understandable one under Virginia law. The Petitioner's contention that it possesses a clear decree, and an unclear issue which will be helpful in resolving questions of national importance is without merit whether considered in light of this Court's previous opinion or in light of Virginia law.

2. There Is No Conflict Of Decisions As To The Meaning Of This Court's Opinion.

Petitioner dwells at length (Petition, pp. 6-14) on its contention that subsequent decisions have interpreted this Court's opinion in the same way as the Chancellor did in writing his 1965 opinion and in issuing the 1965 decree. After examination, the cases cited by Petitioner are seen to be completely different than the narrow viewpoint of the Chancellor. As the Virginia Supreme Court states, the Chancellor's interpretation is the very narrowest interpretation that can be made as to the meaning and effect

of this Court's opinion. The cases cited, on the other hand, give "breathing room" to the opinion. *Illinois Bar Association* v. *United Mine Workers of America, Dist. 12,* 35 Ill. 2d 111, 219 N.E. 2d 503 (1966) deals with a union which had a lawyer on its payroll representing its members in workmen's compensation claims without any fees being paid by the injured members. The case thus presented a square question as to whether unions can have house counsel to the same extent as corporations and insurance companies. Deciding that the union could not, the Supreme Court of Illinois did not narrowly construe this Court's opinion. Instead, it limited its decision to the "house counsel" issue stating in 219 N.E. 2d 503 at page 509:

> "The court there (377 U.S. 5, n. 9, 84 S. Ct. 1113) specifically pointed out that the railroad trainmen were objecting to only those portions of the decree encompassed by the language of the holding, as the brotherhood had denied that it was engaging in practices forbidden by our decree in In Re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163. Accordingly, that holding does not purport to overturn our decision precluding any financial connection between the brotherhood and the counsel selected by it to handle individual membership claims. As a consequence, we do not read Virginia Railroad Trainmen as constitutionally protecting the conduct we are concerned with here, i. e. employment on a salary basis by a labor union of counsel to represent individual members' claims before the Industrial Commission. The circuit court decree in question here does not attempt to restrain the union from advising its members to seek legal advice or from recommending particular attorneys thought competent to handle workmen's compensation claims. As related earlier, our decision in *In Re Brotherhood of Railroad Trainmen* specifically allows such conduct."

Other opinions cited by the Petitioner are wholly inadequate bases for Petitioner's contention. *State* v. *Williams* (Fla. 1966), 183 S (2d) 537, cert. denied, docket No. 160, 87 S. Ct. 42, is a case where an attorney sought a writ of prohibition to prevent his prosecution for violations of a statute making the solicitation of legal business a criminal offense. He had no connection with any union or with any other group involved in providing or facilitating the providing of legal services. The court limited its opinion by saying at page 540:

> "Our decision herein is limited to upholding the validity of said statute and to a denial of the writ and is not otherwise dispositive of any other question of law or fact that have been or may be raised in the instant case."

Likewise, *Dombey, Tyler, Richards & Greiser* v. *D.T. & I.R. Co.*, (C.A. 6) 351 F. 2d 121 (1965) is no authority for Petitioner's contention. The court there held that the Brotherhood opinion protected the "solicitation" of Dombey's employment by a union representative. See 351 F. 2d 128. Its use of the same word in connection with the Chicago Brotherhood counsel does not infer that such conduct was unprotected or illegal. Moreover, such issues were not contested since they were irrelevant to the suit for fees after the railroad defendant had settled the injury case behind the back of plaintiff's attorney. The irrelevancy of this case to Petitioner's contention is so apparent that it seems to be inserted only because the Chicago law firm has been of counsel in this case. Such fact is as irrelevant as the fact that counsel for the State Bar in this case is, and has been for years, Division Counsel for the Chesapeake & Ohio Railway Company, Vol. 3, *Martindale-Hubbell Law Directory*, p. 1909-B (1966).

It is difficult to understand the position of the State Bar at this point. The State Bar adamantly insists that the decree below makes a perfectly clear distinction between "solicitation" and "recommendation". (It will be remembered that this is the identical contention which the State Bar made before this Court in seeking to sustain the 1962 decree.) Contrary to the actual holding, the State Bar insists that its cited cases make the same distinction. Since the cases do not support this contention, there is no basis for the assertion that a conflict of decisions exists.

3. There Is No Ambiguity in This Court's Opinion.

This Court issued its opinion on the four volume Transcript of Record before it. As previously mentioned, that Record was devoid of evidence concerning Brotherhood activities in Virginia. Petitioner pled that a local contact was made by one of Respondent's agents recommending the employment of the Brotherhood's designated attorneys in all personal injury and death cases (R. Vol. B-1, p. 23). Respondent admitted that this occurred in some cases (R. Vol. B-1, p. 5). The 1962 decree enjoined such practices and this Court's opinion set aside that injunction. There is nothing ambiguous in that holding or in this Court's opinion.

Any ambiguity in the case exists because of the untenable contentions advanced by the Petitioner. It has sought to enjoin the Brotherhood on a record based on bits and snatches of evidence from other cases against the Brotherhood as far back as 1932 and from selected claims in 1960 and 1961. These cases occurred throughout the United States but not in Virginia. Petitioner even introduced evidence proffered by another State Bar in a case which resulted in a Consent Decree. The Brotherhood has consistently taken the position that no injunction can be based on that type of evidence.

However, this Court did not consider that contention of the Brotherhood when it struck down the phrases of the 1962 decree prohibiting "soliciting" and "channeling" (See footnote 9, R. Vol. A, p. 4).

Immediately after this Court's opinion was filed, Petitioner here sought a rehearing claiming that this Court's opinion was ambiguous and it has consistently so claimed ever since. The fact of the matter, however, is that the Record has not changed since the opinion of this Court was issued. The only rational basis for any injunction has been on the "channeling" theory adopted in the 1962 decree. (This may only be because the Brotherhood admitted such channeling). That theory, of course, is obliterated by this Court's opinion. Since its obliteration, the only proper action for the court below would be the dismissal of the Complaint. The court below, however, stated that the question before it was whether the injunctive proceedings were consistent with the opinion of this Court and that it must amend the decree to remedy any inconsistency (Appendix B to the Petition, p. 24). It further held that all other objections to the other provisions of the 1965 decree were not supported by "sound reason" (Appendix B to the Petition, p. 33). On the point in issue here, the court stated, in a paragraph misquoted at page 31 of Appendix B to the Petition, as follows:

> "Whether or not the Brotherhood confines its words to those of recommendation, its conduct includes far more than 'mere statements of opinion respecting the ability of a lawyer'. Its activities designed to obtain representation for specific lawyers, are illegal under the statute proscribing running and capping. This statute is not referred to specifically in the 1965 decree, but is incorporated by the general reference to the laws governing the practice of law in Virginia. The statute authorized the injunction entered by the

> Chancellor, but the injunction must yield to the mandate of the Supreme Court."

When this paragraph is correctly quoted and considered, it is apparent that the Virginia court has not created any ambiguity. It is plain that that court is stating that the Virginia statute would forbid any "channeling". It is further stating that a group practice of recommending the group's lawyer would amount to "solicitation" within the meaning of the Virginia statute. This, of course, is apparent when another case involving the Virginia statutes is considered. In that case, *NAACP* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. ed. 2d 405, the Virginia Supreme Court had made it clear that it was the grouping of individual recommendations that created the vice prohibited by the Virginia statute. That prohibition, of course, was struck down by this Court. In the *Button* opinion, the court held that the invalidation of the statute as applied was not based on the particular nature of the group involved. Because of such invalidation, the Virginia court in this case may have been stretching the *Button* opinion to the advantage of the State Bar in permitting its application against another group providing legal services.

Be that as it may, there is no ambiguity in either this Court's opinion or in the opinion of the court below. The Petitioner's contention here is itself an ambiguous one. In fact, that contention is the same one struck down in *NAACP* v. *Button*, and again in this Court's opinion in this case for, as this Court said in both cases, "A State cannot foreclose the exercise of constitutional rights by mere labels". Petitioner's attempt to use an invidious label as a substitute for evidence should again be struck down.

4. There Are No Substantive Evils Justifying An Injunction.

Although the court below directs that an injunction be issued, it is apparent that there are no substantive evils justifying an injunction as this Court held that the State had failed to show any appreciable public interest to justify the prohibition of the Brotherhood's plan. Such a principle must be pressed, for it is clear that an injunction absent evidence may lead to the establishment of tyranny by the judiciary. It was with that thought in mind that Respondent filed, not a Petition for Rehearing, but a "Petition for Modification of Opinion or Rehearing" in the court below. In that Petition of 4 pages, Respondent contended that the Virginia Supreme Court of Appeals proceeded from a false premise in that it assumed that the Complaint could not be dismissed and that the Brotherhood must be placed under an amended decree of injunction. That court felt that the mandate of this Court required such result. The rehearing portion of that Petition was directed solely to the court's holding that attorneys would be subject either to injunction or discipline despite this Court's opinion. It was urged that such a holding could not be based on the record of the case which was devoid of either "evidence or a claim by the State Bar that any brotherhood lawyers were engaged in running or capping for themselves".

Though it is clear that there are no substantive evils permitting the State to regulate the conduct of the Brotherhood, the State Bar with obvious desperation asserts that the dire predictions in its rehearing petition in this Court have come to pass and, as evidence therefor, cites passages from various Briefs filed in this case in the courts below. The State Bar does not suggest, however, how it can be harmed if its contention were true since an

injunction has been ordered by the Supreme Court of Appeals against those other practices which the State Bar finds so abhorrent. It concludes by being shocked that the Brotherhood asserts that its constitutional rights must be given "breathing room". This, of course, is a quoting of that phrase from the opinions of this Court. The fact that the State Bar is shocked demonstrates how little attention it has paid to this Court's opinions.

5. This Court Should Not Issue An Advisory Opinion.

The State Bar claims that this matter is one of national importance and that this Court has a duty to answer all of the theoretical questions which the State Bar propounds. Even if this Court desired to do so, it is respectfully suggested that it is impossible to write an opinion showing "proper balance" between the constitutional rights of association members and the right of the State to regulate the practice of law. The fact remains that this must always be so and that cases should be decided on a case-by-case basis not to mention the constitutional problems caused by attempting to announce guide lines when no "case or controversy" exists.

Having lost its case on its first appearance before this Court, the State Bar filed a Petition for Rehearing and that Petition was denied. Now, by means of its Petition for Certiorari, the State Bar seeks another rehearing. This Court should refuse that request.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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